



**Dima v Republic (Miscellaneous Criminal Application  
E024 of 2023) [2024] KEHC 725 (KLR) (30 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 725 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
MISCELLANEOUS CRIMINAL APPLICATION E024 OF 2023**

**JN ONYIEGO, J  
JANUARY 30, 2024**

**BETWEEN**

**ABDIFATAH MOHAMED DIMA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Applicant herein was arrested on 25/7/18 and arraigned before Garissa Chief Magistrate's Court on 26/7/18 charged with the offence of Arson contrary to section 332 (a) of the [Penal Code](#). Particulars were that on the 25<sup>th</sup> day of July, 2018 at around 0700 hrs in Madogo Secondary School within Madogo location of Tana River County, jointly with others not before court willfully and unlawfully set fire to boys' dormitory valued at Kshs.7 million belonging to Madogo Secondary School.
2. Having returned a plea of not guilty, the matter proceeded to full trial with the prosecution calling a total of six witnesses. Upon conclusion of the trial, the Applicant was convicted and sentenced to serve 5 years' imprisonment on 30/6/21.
3. Subsequently, he moved to this court vide a chamber summons dated 10/10/23 and what is referred to as humble mitigation thus seeking for leniency from the court by according him non-custodial sentence. That he has since reformed; that the court takes into account 9 months the period spent in remand custody; that he is a young man whose education was interrupted by this case.
4. When the application came up for hearing, the applicant orally reiterated the same grounds. He simply sought for a non-custodial sentence and consideration of the period spent in remand custody.
5. On his part, Mr. Kihara counsel for the State opposed the application arguing that throughout the trial, the applicant was on bond and that the sentence imposed was appropriate.



6. I have considered the application herein and the response thereof. The Applicant's application is basically seeking a revision of sentence from custodial sentence to non-custodial sentence.
7. It is trite that sentencing is a discretionary issue exercisable by the trial court and that an appellate court can only interfere if the same is excessive, arrived at upon considering irrelevant factors or application of wrong legal principles. See *MMI v Republic* [2022] eKLR.
8. In the circumstances of this case, the applicant is seeking invocation of Section 333(2) of the *CPC* which provides that when a trial court is imposing sentence, it must take into account the period spent in remand custody. This position was succinctly stated in the case of *Boniface Mugo Maingi v Republic* [2021] eKLR.
9. From the record of the lower court proceedings, the applicant was arrested on 25/7/2018 and arraigned in court on 26/7/2018. On 2/8/2018 he was released on bond thus serving 8 days in remand custody. On 22/10/2020, the surety withdrew and the accused was once again remanded in custody till 30/6/21 when he was sentenced thus translating to 8 months and 8 days stay in remand custody. In total, he spent 8 months and 16 days in remand custody.
10. In view of the statutory requirement under section 333 (2) of the *CPC* that the period spent in remand custody be taken into account, the trial court was obligated to take into account that period. To that extent, I do agree with the applicant that the period ought to have been considered.
11. As regards the issue of excessive penalty, one ought to consider the seriousness of the offence vis a vis the mitigating factors. The offence in question attracts a maximum of life imprisonment. The value of the school property destroyed was 7 million which is quite a huge sum. A period of 5 years in my view was not excessive and the same was appropriate and commensurate to the gravity of the offence committed.
12. Having held that the court properly exercised discretion, I am inclined to uphold the same. However, the sentence period shall be served less the period of 8 months and 16 days being the period spent in a remand custody. To that extent, the application partially succeeds. Right of appeals 14 days.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 30TH DAY OF JANUARY 2024**

**J. N. ONYIEGO**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

